BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LARRY J. WYRICK Claimant	)	
VS.	)	
BINGHAM TRANSPORTATION, INC. Respondent	)	Docket No. 1,052,230
AND	)	
BERKSHIRE HATHAWAY HOMESTATE INSURANCE CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 26, 2013, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on December 17, 2013. William L. Phalen of Pittsburg, Kansas, appeared for claimant. Michael P. Bandrè of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant has a combined previous functional impairment of 27 percent as a result of his prior workers compensation claims, and respondent is entitled to a reduction for that amount. Therefore, claimant is entitled to temporary total disability compensation benefits and permanent total general body disability benefits, less said reduction. Additionally, the ALJ found claimant entitled to all outstanding and unauthorized medical treatment, with future medical treatment to be considered upon proper application to the Division.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the offset applied by the ALJ should not apply under K.S.A. 44-510a(a) as there is no evidence claimant's prior compensable claims contributed to his

permanent total disability status. Further, claimant contends his prior workers compensation settlements would have been paid prior to the latest injury, and under K.S.A. 44-510a(a) no reduction should be warranted.

Respondent maintains claimant has substantial preexisting functional impairment, and claimant's injury was an aggravation of his preexisting back condition. Respondent argues the evidence shows it was a combination of claimant's prior impairment and 2009 injury which made him permanently and totally disabled, and therefore, it is required by statute to reduce the final award in this claim. Additionally, respondent contends the appropriate functional impairment reduction should be 31 percent.

The sole issue for the Board's review is: Is respondent entitled to a credit for claimant's previous workers compensation injuries and impairment?

FINDINGS OF FACT

Claimant had been employed with respondent since 1993 as an over-the-road truck driver, hauling salt, gravel, sand, and grain products. At the time of the regular hearing, claimant was 66 years old with a high school education. Claimant also completed an over-the-road truck driving program in 1992 and obtained his CDL driver's license. Claimant testified he is responsible for cleaning his truck in all conditions, and in winter the trailers become icy and treacherous.

Claimant settled an undocketed workers compensation claim on February 20, 2003, receiving an amount reflecting a 17 percent impairment of function to the body as a whole relating to a back injury. Claimant settled the claim *pro se*. In 2001, claimant fell onto rocks and injured his back while at a dump site in Oklahoma. Dr. Allan S. Fielding, a board certified neurosurgeon in Tulsa, Oklahoma, diagnosed claimant with an L5-S1 spondylolisthesis and foraminal stenosis with a pinched nerve. Claimant underwent a decompressive laminectory with fusion at L5-S1 with Dr. Fielding on February 14, 2002.

Dr. Fielding testified claimant did well following surgery and released claimant with no restrictions. Claimant testified he returned to work with no pain and performed his full range of duties until June 28, 2004, when he slipped on steel steps, fell on his back, and developed pain in his back, right hip, and right leg. Dr. Fielding diagnosed claimant with a disk herniation at the L5-S1 level on the right. Claimant was treated conservatively and then underwent surgery: an L4-5 laminectomy, facetectomy, and fusion using instrumentation. A bone growth stimulator was implanted in claimant and eventually removed. Dr. Fielding stated claimant did well following his surgery and was released from care in 2005 with no restrictions. Claimant returned to work at respondent and performed his full range of duties with no pain.

Claimant returned to Dr. Fielding for rating purposes in 2005. Using the AMA *Guides* (5th ed.),[1] Dr. Fielding rated claimant with a 10 percent impairment to the body as a whole over and above claimant's previous rating of 17 percent. After converting this impairment rating using the AMA *Guides* (4th ed.), Dr. Fielding determined claimant had a 14 percent impairment to the body as a whole. At a settlement hearing on September 21, 2005, claimant, appearing *pro se*, settled this undocketed workers compensation claim and received an amount reflecting a 10 percent permanent partial disability to the body as a whole.

Claimant continued to work at respondent with no restrictions, performing his full range of job duties without accommodation, until December 8, 2009. On this date, claimant testified he arrived at a dump site at approximately 2:30 a.m. in icy conditions. Claimant slipped and fell on his back while opening the tailgate of his truck. He testified he experienced immediate pain in a wide area of his back and down both legs. Claimant timely notified respondent of the accident.

Claimant was referred to Dr. James Smith, a surgeon, who provided claimant with therapy and medication. Dr. Smith diagnosed claimant with borderline spinal stenosis at L3-4, mild circumferential annular disk bulging at L4-5, and grade I spondylolisthesis at L5-S1. Dr. Smith recommended claimant undergo surgery for anterior lumbar interbody fusion at L5-S1 and posterior arthrodesis at L3-4.

Dr. Edward J. Prostic, a board certified orthopedic surgeon, first examined claimant at his counsel's request on June 14, 2010. Claimant presented with complaints of constant pain from the low back to the legs with numbness and tingling. Claimant complained of sleeping poorly. He indicated to Dr. Prostic difficulty upon awakening and worsening with sitting, standing, walking, bending, squatting, twisting, lifting, pushing, and pulling. Dr. Prostic testified claimant's complaints were attributable to claimant's December 8, 2009 fall.

After reviewing claimant's medical records and performing a physical examination, Dr. Prostic diagnosed claimant with lumbar spinal stenosis, most likely at L3-4. He opined claimant's condition was caused or permanently aggravated by the work-related accident sustained at respondent on December 8, 2009. Dr. Prostic recommended claimant receive epidural steroid injections with the consideration of surgery should said injections be unsuccessful. Dr. Prostic opined claimant was temporarily totally disabled from gainful employment at that time.

---

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed.). The State of Oklahoma utilized this edition at the time of the rating. All future references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Mark Bernhardt, a court-ordered medical evaluator, reviewed claimant's medical history and examined claimant for purposes of an independent medical evaluation on June 21, 2011. Dr. Bernhardt did not consider claimant a candidate for surgery but recommended claimant limit his activities on a permanent basis and pursue chronic pain management measures. Dr. Bernhardt opined claimant may also benefit from neurostimulation/neuromodulation treatment.

Claimant returned to Dr. Prostic on October 9, 2012. Dr. Prostic took an updated medical history of claimant. At that time, claimant continued to take medication prescribed by Dr. Smith and had started receiving pain management by Dr. Stephen Hendler, claimant's appointed physician. Claimant complained to Dr. Prostic of pain from his low back to his left lower leg, awakening from sleep several times a night, continuing to take medication, and the need to use a cane. Claimant had worsening with almost all activities. Dr. Prostic testified these complaints are consistent with the mechanism of injury occurring December 8, 2009.

Dr. Prostic performed a physical examination of claimant, the results of which were consistent with claimant's complaints of pain and mechanism of injury. Dr. Prostic diagnosed claimant with lumbar spinal stenosis, and he testified he continues to believe claimant's condition was caused or permanently aggravated by the December 2009 accident. Dr. Prostic opined that in addition to the pain management previously recommended, claimant should undergo a trial of antidepressant medication and epidural injections.

Dr. Prostic restricted claimant, stating "at most he can do predominantly sedentary activities with the ability to change position as needed for comfort."[2] Using the AMA *Guides*, Dr. Prostic opined claimant's new orthopedic impairment is 15 percent of the body as a whole on a functional basis, over and above any preexisting disease or impairment. Dr. Prostic testified this 15 percent impairment rating is a result of claimant's work injury on December 8, 2009.

Karen Terrill, a rehabilitation consultant, interviewed claimant at his counsel's request on January 7, 2013. Ms. Terrill generated a list of 10 unduplicated tasks claimant has performed in the past 15 years. Dr. Prostic reviewed the task list prepared by Ms. Terrill, and of the 10 unduplicated tasks on the list, Dr. Prostic opined claimant was unable to perform 7, for a 70 percent task loss. Further, Dr. Prostic opined claimant is permanently and totally disabled from performing substantial, gainful employment as a result of the December 2009 injury at respondent.

Claimant testified he continues to treat with Dr. Hendler, who provides pain management in the form of medication. Claimant stated he could not maintain the pace

[2] Prostic Depo. at 17.

of a work environment nor is he able to work. He was approved for social security disability benefits. Claimant continues out of work since his December 8, 2009 accident.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-501(c) states: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act provides:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[3]

The burden of proving a claimant's amount of preexisting impairment belongs to respondent once claimant has come forward with evidence of aggravation or acceleration of the preexisting condition.[4]

ANALYSIS

The sole issue on appeal is whether respondent is entitled to a credit for claimant's previous workers compensation injuries and impairment. Evidence of a preexisting condition and preexisting impairment was provided by Dr. Fielding. Based upon Dr. Fielding's testimony and written report, claimant experienced a 17 percent permanent

---

[3] K.S.A. 2009 Supp. 44-501(c).

[4] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

partial impairment in 2002 resulting from an injury in 2001, and a 14 percent impairment resulting from an injury on June 28, 2004. Dr. Fielding stated that the 14 percent was "over and above" claimant's prior 17 percent rating.[5] Dr. Prostic testified claimant's permanent total disability is a result of claimant's overall condition, including the two prior back injuries.[6]

Claimant's argument that respondent is not entitled to a reduction for preexisting impairment is inappropriate. *Lyons*, cited by claimant, is distinguishable.[7] In *Lyons*, the Kansas Court of Appeals held K.S.A. 44-501(c) to be inapplicable because the evidence was disputed regarding whether claimant's preexisting condition was aggravated by his more recent injury.[8] In this case, there is no question claimant's preexisting condition was aggravated by his 2009 accidental injury, even according to claimant's medical expert, Dr. Prostic. Therefore, a reduction for an aggravation of a preexisting condition under K.S.A. 44-501(c) is warranted.

The majority recognizes that a rating for a prior disability does not establish the degree of disability at the time of the second injury.[9] In *Baxter*, the respondent alleged claimant had a 100 percent preexisting impairment. It is obvious from the facts that the claimant in *Baxter*, because he was working full time, did not experience a 100 percent impairment at the time of his second accident. In this case, the issue of the extent of preexisting impairment is more clear. Dr. Fielding testified that claimant had a 17 percent impairment from his first surgery and, in addition to that, a 14 percent impairment after his second surgery. Dr. Prostic testified that claimant had a 35 to 40 percent impairment, 15 percent of which resulted from the injury giving rise to this claim.

The Board cannot disregard claimant's two prior lumbar spine surgeries in concluding he had preexisting impairment. According to K.S.A. 44-510e(a), "Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein."[10] The

---

[5] Fielding Depo. at 8.

[6] Prostic Depo. at 26.

[7] *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, 102 P.3d 1169, 1176 (2004).

[8] *Id.* at 379.

[9] *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 593, 738 P.2d 445, 449 (1987).

[10] The *Guides* separately define permanent impairment as an alteration of health status, a loss of psychological, physiological or anatomical structure of function, and conditions that interfere with activities of daily living . *Guides*, p. 1. The statutory definition is arguably different. Specific Kansas statutes control

Board cannot conclude claimant had no preexisting permanent impairment after two lumbar surgeries and settlements based on permanent impairment.

K.S.A. 2009 Supp. 44-501(c) does not instruct the ALJ or the Board how to combine multiple preexisting impairments. The determination of how the preexisting credit is calculated is made on a case by case basis. In this case, the majority finds the appropriate method of combining multiple prior impairment in this claim is to add the actual impairments from prior ratings. Dr. Fielding specifically stated that the second impairment was over and above the first. Each of the prior impairment ratings resulted from separate injuries for which claimant received workers compensation benefits.

The dissent would combine the two preexisting impairments under the Combined Value Chart contained in the AMA *Guides* and then average the result with Dr. Prostic's rating. K.S.A. 2009 Supp. 44-501(c) requires an award of compensation to be reduced by the amount of functional impairment determined to be preexisting. The Board determines claimant experienced two separate preexisting impairments. Each rating supports a separate basis for a separate preexisting credit of 17 percent and 14 percent, which equals 31 percent.

The analysis for determining the amount of credit for a preexisting disability in a case involving permanent total disability is found in *Payne v. Boeing Co.*[11] *Payne* involved a claimant who, all parties agreed, suffered from a permanent total disability (PTD) as a consequence of her 2002 work-related injury. The ALJ and the Board found claimant's 2002 accidental injury aggravated her preexisting condition and that claimant had a 35 percent preexisting permanent functional impairment to the whole body. The Board found respondent was entitled to a credit pursuant to K.S.A. 44-501(c), which should be applied to reduce claimant's PTD award. The Board in *Payne* agreed with the ALJ that the credit should be applied using the following four-step process:[12]

> 1. Determine the number of weeks the $125,000 PTD award would take to pay out utilizing the applicable compensation rate of $417, which was 299.76 weeks.
>
> 2. Determine the number of weeks it would take to pay permanent partial disability (PPD), at the same rate, based on the preexisting 35 percent whole body functional impairment, which was 145.25 weeks.
>
> 3. Subtract 145.25 weeks from 299.76 weeks, which equaled 154.51 weeks.

---

where there is potential conflict with the *Guides*. *Redd v. Kansas Truck Ctr.*, 291 Kan. 176, 196-97, 239 P.3d 66 (2010).

[11] *Payne v. Boeing Co.*, 39 Kan. App. 2d 353, 180 P.3d 590 (2008).

[12] *Ballard v. Dodlinger & Sons Construction Company, Inc.*, No. 1,054,021, 2013 WL 1876342 (Kan. WCAB Apr. 29, 2013).

4. Multiply 154.51 weeks and the $417 weekly compensation rate, the product of which represented the PTD claimant was entitled to receive.

Based on this four-step method, the Board in *Payne* found claimant was entitled to a PTD award for 154.51 weeks (299.76 weeks minus 145.25 weeks equals 154.51 weeks), at $417 per week, totaling $64,430.67. In *Payne*, the Kansas Court of Appeals affirmed the Board's Order.

Applying the four-step method the Board used in *Payne*:

1. The number of weeks the $125,000 PTD award would take to pay out utilizing the applicable compensation rate of $546.00 is 228.93 weeks.

2. It would take 126.79 (430 - 21 = 409 x .31) weeks to pay PPD at the preexisiting 31 percent whole body functional impairment.

3. Subtracting the 126.79 weeks from the 228.93 available PTD weeks, equals 102.64 weeks.

4. 102.64 weeks multiplied by the compensation rate of $546.00 per week, results in a benefit of $55,786.44.

CONCLUSION

Respondent is entitled to a 31 percent credit for claimant's previous workers compensation injuries and impairment.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 26, 2013, is modified.

Claimant is entitled to 21 weeks of temporary total disability in the amount of $11,466.00, and 102.14 weeks of permanent total disability benefits in the amount of $55,768.44, for a total award of $67,234.44. As of the date of this Order, all amounts are due and owing.

All other orders of the ALJ are affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

DISSENTING OPINION

Preexisting impairment should be based on the *Guides*[13] and credible medical evidence.

The undersigned Board Members disagree with the majority's decision to add together two prior lumbar spine ratings to arrive at claimant's preexisting rating. In assessing claimant's preexisting impairment, we dissenting Board Members would combine Dr. Fielding's prior ratings. We would also give equal weight to Dr. Prostic's opinion regarding claimant's preexisting impairment.

Under terminology used in the *Guides*, *adding* and *combining* impairments are different functions. A rating derived from combining ratings is based on the Combined Values Chart starting on page 322 of the *Guides*. An example noted on such page shows that a 35% impairment combined with a 20% impairment results in a 48% impairment.[14]

---

[13] See *Criswell v. U.S.D. 497*, No. 104,517, 263 P.3d 222 (Kansas Court of Appeals unpublished opinion filed Nov. 10, 2011), *rev. denied* Feb. 4, 2013.

[14] The full commentary in the *Guides* is as follows:

The values are derived from the formula A + B(1-A) = *combined* value of A and B, where A and B are the decimal equivalents of the impairment ratings. In the chart all values are expressed as percents. To *combine* any two impairment values, locate the larger of the values on the side of the chart and read along that row until you come to the column indicated by the smaller value at the bottom of the chart. At the intersection of the row and the column is the combined value.

Combining claimant's 17% and 14% impairment ratings would result in a prior impairment of 27% to the body as a whole, instead of the 31% the majority calculated based on simple addition.

Unfortunately, Kansas statutes and the *Guides* do not provide clear instruction on how to address multiple prior impairments, i.e., whether to just add them up or combine them. However, the *Guides* tell us to use the Combined Values Chart to arrive at an overall impairment for different organ systems and total impairment involving singular and distinct body parts, including impairment related to spine disorders.[15] For example, the Range of Motion Model for determining spinal impairment, which is what Drs. Prostic and Fielding utilized, instruct the evaluator to combine impairment for diagnosis-based impairment and range of motion impairment using the Combined Values Chart.[16] The *Guides* also indicate that impairment due to more than one vertebral compression, fracture of a spinal posterior element, or reduced dislocation of a vertebra should be combined using the Combined Values Chart.[17]

The *Guides* also tell the reader when to add impairments,[18] such as adding impairment due to multiple levels of spinal injury or multiple spinal operations,[19] but this appears to be a less frequent directive based on our review of the *Guides*.

For example, to combine 35% and 20% read down the side of the chart until you come to the larger value, 35%. Then read across the 35% row until you come to the column indicated by 20% at the bottom of the chart. At the intersection of the row and column is the number 48. Therefore, 35% *combined* with 20% is 48%. Due to the construction of this chart, the larger impairment value must be identified at the side of the chart.

If three or more impairment values are to be combined, select any two and find their combined value as above. Then use that value and the third value to locate the combined value of all. This process can be repeated indefinitely, the final value in each instance being the combination of all the previous values. In each step of this process the larger impairment value must be identified at the side of the chart.

Note: If impairments from two or more organ systems are to be *combined* to express a whole-person impairment, each must first be expressed as a whole-person impairment percent.

[15] *Guides*, p. 8 (§ 2.2 Rules for Evaluations), 105, 107-111, 113, 116; see also 15-17, 24, 29-30, 34-35, 46, 49, 51, 53-54, 56-64, 67, 68-72 (upper extremity, finger, thumb), 79 (hip), 81 (ankle) and 84 (lower extremity).

[16] *Id.* at 116.

[17] *Id.* at 113.

[18] *Id.* at 26-27, 29, 66 (thumb range of motion), 36-38 (wrist range of motion), 41 (upper extremity), 42-45 (shoulder) and 68 (hand).

[19] *Id.* at 113.

The majority's reliance on prior ratings to arrive at an overall preexisting 31% whole body impairment rating is also contrary to Kansas Supreme Court precedent. In *Baxter v. L. T. Walls Constr. Co.*,[20] the Kansas Supreme Court noted:

> Prior settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not establish the degree of disability at the time of the second injury. One hundred percent permanent partial disability is not an unalterable condition and a worker may be rehabilitated and then return to work. A worker who has once been adjudged 100 percent permanently partially disabled and has received or is receiving benefits, but thereafter returns to work and is again injured while working, is not precluded from receiving benefits for the loss of wages resulting from the subsequent injury's aggravation of his disability. A disabled worker may receive disability benefits more than once, but the worker may not pyramid benefits and receive in excess of the maximum weekly benefits provided by statute.[21]

The majority's methodology for determining the degree of prior impairment does not echo *Baxter*. The Board is duty bound to follow appellate precedent.[22] *Baxter* does not equate a prior rating as absolute proof of the degree of preexisting impairment. *Baxter* rejects such approach.

The Board has combined – not added – multiple prior impairments when assessing a K.S.A. 44-501(c) credit.[23] The Board has also cautioned against simply adding up prior impairment ratings to determine preexisting impairment:

> Simply stated, based upon this record it cannot be stated that Dr. Stuckmeyer appropriately arrived at his opinion regarding claimant's preexisting

---

[20] 241 Kan. 588, 738 P.2d 445, 449 (1987).

[21] *Id.* at 593; see also *Langel v. Brighton Gardens*, No. 98,684, 188 P.3d 977 (Kansas Court of Appeals unpublished opinion dated Aug. 1, 2008). Cf. *Kirker v. Bob Bergkamp Constr. Co., Inc.,* No. 107,058, 286 P.3d 576 (Kansas Court of Appeals unpublished opinion dated Oct. 12, 2012) (Claimant had a new bilateral upper extremity injury subsequent to an initial settlement. Claimant had prior ratings of 7.05% and 10% to each upper extremity. His prior settlement was based on an 8% impairment of function. The Board initially concluded respondent failed to prove the degree of claimant's preexisting impairment. The Kansas Court of Appeals remanded the matter, instructing the Board to determine claimant's preexisting impairment, but did not simply instruct the Board to conclude claimant's preexisting should absolutely be based on either prior rating.)

[22] See *Gadberry v. R. L. Polk & Co.*, 25 Kan. App. 2d 800, 808, 975 P.2d 807 (1998). *Baxter* is still binding precedent.

[23] *Barker v. Grace, Unruh & Pratt*, No. 247,134, 2012 WL 2061790 (Kan. WCAB May 14, 2012), *aff'd in part, reversed in part*, *Barker v. Grace, Unruh & Pratt*, No. 108,223 (Kansas Court of Appeals unpublished opinion filed Sep. 13, 2013).

> impairment when he simply added up percentages of disability claimant had allegedly received for previous workers compensation claims. Again, the fact that claimant settled previous claims for certain percentages does not, standing alone, establish her preexisting functional impairment. While it is probably true claimant had a functional impairment as a result of her previous injuries, for purposes of K.S.A. 44-501(c) respondent and its insurance carrier have failed to prove the percent of functional impairment per the AMA *Guides* that existed in claimant's back before her March 20, 2004 accident.[24]

The *Guides* also note that reliance on prior impairment ratings is potentially unreliable:

> A physician who is asked to reevaluate an individual's impairment must realize that change may have occurred, even though a previous evaluator considered the impairment to be permanent. For instance, the condition may have become worse as a result of aggravation or clinical progression, or it may have improved. The physician should assess the *current* state of the impairment according to the criteria in the *Guides*.
>
> Valid assessment of a change in the impairment estimate would depend on the reliability of the previous estimate and the reliability of the evidence on which it was based. . . .
>
> For example, in apportioning a spine impairment, first the current spine impairment would be estimated and then impairment from any preexisting spine problem would be estimated. The estimate for the preexisting impairment would be subtracted from that for the present impairment to account for the effects of the former. Using this approach to apportionment would require accurate information and data on both impairments.[25]

The general theme between *Baxter* and the *Guides* is that a prior rating does not necessarily establish the current degree of preexisting impairment. However, that is exactly what the majority is doing.

Dr. Fielding never assessed claimant's current overall impairment and he did not provide an opinion regarding claimant's impairment just prior to his 2009 injury. Unlike what is suggested in the *Guides*, Dr. Fielding did not determine claimant's overall impairment and deduct claimant's prior impairment. All this being said, there is good reason for the Board to at least consider Dr. Fielding's opinions is assessing claimant's preexisting impairment. Dr. Fielding was claimant's treating physician. He performed two

---

[24] *Langel v. Brighton Gardens*, No. 1,016,720, 2007 WL 1390698 (Kan. WCAB Apr. 27, 2007), *aff'd Langel v. Brighton Gardens*, No. 98,684, 188 P.3d 977 (Kansas Court of Appeals unpublished opinion filed Aug. 1, 2008).

[25] *Guides*, pp. 9-10; see also p. 101.

lumbar surgeries and provided relatively contemporaneous rating reports. Dr. Fielding was the only testifying physician with the opportunity to assess claimant's impairment prior to the occurrence of the 2009 accidental injury. However, *Baxter* illustrates his testimony really only establishes his opinion that claimant had a 17% whole body impairment on December 3, 2002 and an additional 14% whole body impairment as of June 10, 2005. *Baxter* illustrates that the Board should at least ask if those ratings accurately reflected claimant's impairment at the time of claimant's late-2009 accidental injury.

Dr. Prostic generally followed the dictates of the *Guides* by determining both claimant's overall impairment and his impairment due to the most recent work injury. Dr. Prostic testified claimant's overall impairment due to his low back was 35-40% to the body as a whole, claimant had a new 15% impairment to the body as a whole and claimant's preexisting rating was 20-25% to the body as a whole.

Claimant certainly had prior impairment in advance of the new injury. These Board Members would combine the prior ratings from Dr. Fielding to result in a preexisting 27% rating (17% combined with 14% = 27%). To the dissenting Board Members, combining impairments, not just adding them together, is more consistent with the general dictates in the *Guides*. The dissenting Board Members would find claimant had a preexisting 26% impairment to the body as a whole based on splitting the difference between Dr. Prostic's 25% preexisting rating and Dr. Fielding's combined 27% preexisting rating.

_____
BOARD MEMBER

_____
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
wlp@wlphalen.com

Michael P. Bandrè, Attorney for Respondent and its Insurance Carrier
mbandre@hdwlawfirm.com

John D. Clark, Administrative Law Judge